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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

JAMES A. KAY, JR.)

Licensee of One Hundred Fifty Two)
Part 90 Licenses in the)
Los Angeles, California Area)

WT DOCKET No. 94-147

To: The Commission

JAMES A. KAY, JR.'S OPPOSITION
TO THE ENFORCEMENT BUREAU'S
PETITION FOR RECONSIDERATION

ORIGINAL

James A. Kay, Jr. ("Kay"), by his attorneys and pursuant to Section 1.106 of the Commission's Rules and Regulations, 47 C.F.R. § 1.106(g), hereby opposes the February 25, 2002, *Petition for Reconsideration* filed by the Enforcement Bureau ("Bureau") in the above-captioned matter, and respectfully shows the following:

1. The Bureau asserts that the Commission apparently intended to revoke all of Kay's 800 MHz authorizations, but complains that the Commission specifically listed only 25 such call signs in an ordering clause, neglecting to list another nine 800 MHz stations which are found in the licensing records. It will be demonstrated herein that the Bureau's request is unfounded and must be rejected.

2. As Kay has previously showed, there is no justification in the factual record or in the governing law for the revocation of *any* of his licenses,¹ so the Bureau's attempt to expand the universe of revoked licenses certainly may not be countenanced. A proper consideration of this question inescapably leads to a result diametrically opposed to the one proposed by the Bureau.

¹ *Petition for Reconsideration obo James A. Kay, Jr.*, filed on February 25, 2002, in WT Docket No. 94-147.

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3. While the Bureau's petition ostensibly is limited to the above-captioned proceeding, the common facts and issues between the Kay and Sobel proceedings precludes a consideration of the two cases in isolation from one another. On the question of sanctions, particularly, the Commission expressly created an inextricable link by ordering in one proceeding license revocations that were intended, in significant part, to serve as a deterrent to future misconduct by the licensee in the other proceeding. "[T]he revocation of [Sobel's] stations also serves to deter future misconduct by Kay as well as by Sobel."² Proper evaluation of the Bureau's reconsideration request therefore requires consideration of the sanctions imposed in WT Docket No. 97-56, the Sobel case,³ as well as in this proceeding.

4. Following the Bureau's own logic, the Commission must not add to the list of revoked call signs in this proceeding, but should delete from its ordering clause the 25 stations that were specified. According to the Bureau's reasoning, the Commission must modify the scope of its ordering clause to conform to what the Commission "intended." When we view the two cases together, however, it becomes clear that—assuming *arguendo* the validity of the adverse conclusion on the candor issue—the Commission's revocation of even the 25 listed licenses is not consistent with the stated intent of the Commission.

5. In the *Sobel Decision*, the Commission made clear that it was not singling out all of Sobel's 800 MHz stations as such, but rather only those stations implicated in the management agreement between Sobel and Kay. "In specifying the appropriate sanction here, we are mindful that the misconduct found did not affect all of Sobel's licensed facilities, but only the Management Agreement stations."⁴ While the universe of such stations just happened to encompass all of Sobel's 800 MHz licenses, there is nothing of decisional

² *Decision* (FCC 01-341), released January 25, 2002 ("*Kay Decision*") at ¶ 101.

³ *Decision* (FCC 01-342), released January 25, 2002 ("*Sobel Decision*").

⁴ *Sobel Decision* at ¶ 80.

significance about the frequency band in itself. The significant factor was not that the stations are licensed to operate in the 800 MHz band, but rather that the stations were subject to the management agreement.

6. Following that rationale, then, the Commission should not revoke any of Kay's licenses, 800 MHz or otherwise, because none were subject to the management agreement. Nor can it be argued that this would result in no sanction being imposed on Kay. First, a monetary forfeiture has been assessed against Kay. Second, as previously noted (§ 3, *supra*) the Commission views the revocation of Sobel's licenses as, in part, a sanction on Kay.⁵

7. It must be remembered that the Commission has not found Kay or Sobel to be unqualified to remain Commission licensees. Each man has been allowed to retain licenses other than those specifically revoked. Logically, then, there can be only two possible justifications for revoking even a limited portion of the licenses. So, what is the intent of imposing the sanction of limited license revocation? Legally, such a sanction may not be justified as punishment, because license revocation is not a punitive measure.⁶ Accordingly, this particular sanction, therefore, is to serve as a deterrent. But the Bureau ignores the fact that there is no rational basis for imposing this sanction as to any of the licenses, and certainly no record to extend it to other licenses.

8. The Commission, having determined that Kay and Sobel are otherwise qualified to remain Commission licensee's, has arbitrarily decided to revoke a limited group of licenses, namely, all of Sobel's 800 MHz licenses and 25 of Kay's 800 MHz licenses. There is no indication or explanation of how or why the Commission arrived at the determination that this particular magnitude of revocation was necessary to serve as an adequate deterrent. There is no evidence in the record to which the Commission can point in support of its conclusion that the

⁵ *Kay Decision* at ¶ 101.

⁶ *Contemporary Media, Inc. v. FCC*, 214 F.3d 187, 196 (D.C. Cir. 2000); *FCC v. WOKO*, 329 U.S. 223, 228 (1946).

licensees will not be equally deterred by the revocation of fewer licenses or by a monetary forfeiture. Indeed, there is no record evidence whatsoever to suggest that these licensees will not comply with all requirements and deal candidly and honestly with the Commission in the future.

9. The sole purpose for the license revocation (or non-renewal) sanction is to limit the benefit of licensure to those who can be reasonably expected “to deal truthfully with the Commission and to comply with our rules.”⁷ Accordingly, the Commission’s evaluation of an applicant’s qualifications “should be narrowly focused on specific traits which are predictive of an applicant’s propensity to deal honestly with the Commission and comply with the Communications Act or the Commission’s rules or policies.”⁸ And while “deterrence is an important element of the character qualifications process, ... [t]he purpose ... is not, of course, to eliminate licensees from further activity [as licensees], but ... to assure that those granted a license will be truthful in their dealings with the Commission and reliable operators of their stations.”⁹

10. In deciding whether to impose such a remedy, “there should be no presumption that misconduct at one station is necessarily predictive of the operation of the licensee’s other stations.”¹⁰ Whether the revocation (or non-renewal) sanction should extend to stations not directly involved in the alleged misconduct “is ... a question of fact which must be resolved by the Commission on a case-by-case basis. We do not believe ... that there is a basis for

⁷ *Policy Statement on Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 at ¶ 23 (1986) (“*Character Policy Statement*”). Although the Character Policy Statement addresses the qualifications of broadcast applicants, they also set forth the analytical framework under which the Commission determines character qualifications of non-broadcast applicants. See *Western Telecommunications, Inc.*, 3 FCC Rcd 6405 (1988) (applied to microwave radio licensees); *A.S.D. Answer Service, Inc.*, 1 FCC Rcd 753 (1986) (applied to domestic public radio service). “Accordingly, we will use the standards outlined in the Character Policy Statement as a guideline in this instance.” *Baker Creek Communications, L.P.*, 13 FCC Rcd 18709 at n.162 (1998) (involving LMDS).

⁸ *Character Policy Statement* at ¶ 21.

⁹ *Character Policy Statement* at ¶ 104.

¹⁰ *Character Policy Statement* at ¶ 92.

automatically presuming that misconduct at one station means the licensee is unqualified to operate others. [Indeed,] the apparently proper operation of the other stations is itself evidence of the licensee's capacity to operate ... stations in the public interest.¹¹

11. But if this is a "question of fact" as to which the conclusion can not be "automatically presumed," it stands to reason that the Commission must make its determination based on the record of the particular case. Assuming, without conceding, the validity of the adverse candor finding with respect to the management agreement stations, there is absolutely no evidence in the record to suggest that these licensees can not be expected to deal honestly with the Commission and comply with all applicable statutes, regulations, and policies as to all of the other stations. The arbitrary selection of a group of 25 of Kay's 800 MHz stations has no basis in the record or in any sound reasoning, and is in fact inconsistent with the Commission's own reasoning as applied in the Sobel Decision. To expand the list of call signs would exacerbate an already improper and unlawful action.

WHEREFORE, Petitioner James A. Kay, Jr., respectfully requests that the Enforcement Bureau's February 25, 2002 *Petition for Reconsideration* be denied, and renews his request that the Commission reconsider its decisions in both cases and lift all sanctions.

Respectfully submitted:

James A. Kay, Jr.

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Dated: March 12, 2002

¹¹ *Id.*

Certificate of Service

I, Robert J. Keller, counsel for James A. Kay, Jr., hereby certify that on this 12th day of March, 2002, I caused copies of the foregoing OPPOSITION TO THE ENFORCEMENT BUREAU'S PETITION FOR RECONSIDERATION to served, by U.S. mail, first class postage prepaid, and by facsimile to the officials and parties or record in WT Docket No. 94-147, as follows:

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A handwritten signature of Robert J. Keller in black ink, written over a horizontal line.

Robert J. Keller